

STATE OF ALASKA

DEPARTMENT OF COMMUNITY AND ECONOMIC DEVELOPMENT

DIVISION OF INSURANCE

In the Matter of:	)	
	)	
PREMERA BLUE CROSS CONVERSION	)	
	)	
R 03-07	)	Order No 24 – Regarding
	)	Division’s Motion to Strike
	)	Reid and Steel Testimony
	)	

---

The division has moved to strike the prefiled testimony of E. Lewis Reid and John M. Steel, which was filed on behalf of Premera Blue Cross (PBC). The division asserts that the testimony of Reid and Steel, who are lawyers, contains legal argument and opinion that it is not properly presented through witness testimony. PBC opposes the motion.

For support of its motion, the division primarily relies on the rules of evidence and case law applying the evidence rules. PBC opposes the motion citing to AS 21.06.210(c), which states that formal rules of evidence “need not be observed at hearing.” Even if the evidence rules are applied, PBC asserts that the Reid and Steel testimony should be allowed, because they are not testifying as to what the ultimate resolution should be in this matter, but rather they are testifying to assist the director in understanding the various complexities of the proposed transaction. PBC also asserts that the case law cited by the division is distinguishable. Under those cases, the reasons for preventing attorney witnesses from testifying was so that such witnesses would not tell juries how to rule or tell juries what the law means when such information is more properly contained in jury instructions. According to PBC, such reasons do not exist in this matter because the witnesses are providing useful information about aspects of a complicated transaction and because there is no danger that the director will be confused or misled.

Under AS 21.06.210, a party to a hearing is allowed to present documentary or witness evidence in support of the party’s interests. With respect to that evidence, the formal rules of evidence need not be observed at hearing. AS 21.06.210(f). As the presiding state officer at the hearing, I have discretion to decide what evidence is admitted or excluded. *Stein v. Kelso*, 846 P.2d 123, 126 (Alaska 1993). Such decisions may be guided by what is fair and what is needed to expedite the proceedings. *Id.* Based on the case law and administrative rulings cited by the parties, it seems clear that witness testimony that is purely legal argument, conclusions, or opinions should not be allowed, whether or not formal rules of evidence are applied in this proceeding. *See, e.g., In re: Initial Public Offering Securities Litigation*, 174 F.Supp.2d 61, 64 (S.D. N.Y. 2001) (rule prohibiting experts from providing legal opinions or conclusions is often deemed a basic premise or assumption of evidence law); *Appeal of Lockheed Corp.*, 1991 W.L.

47558 at p. 2, ASBCA Nos. 36420, 37495, 39195 (asserting as “black-letter” law that expert legal testimony on issues of law is not permissible). *See also Byrd v. Dark*, 911 S.W.2d 572, 575 (Ark. 1995) (attorneys testifying as expert witnesses on the issue of excessiveness of damages awarded should not be allowed as it is a matter for the trier of fact to decide).

After reviewing the Reid and Steel prefiled testimony, I am persuaded that much of the testimony is legal argument or legal opinion that should not be allowed. Moreover, such testimony is not necessary since the same arguments or opinions have been presented to me in initial and supplemental reports filed by PBC and can be presented to me again through PBC’s counsel in opening/closing statements at hearing or in proposed findings and conclusions of law after the hearing. Notably, PBC does not claim that it will be prejudiced or that its rights will be affected if such testimony is stricken.

Notwithstanding the foregoing, I will allow Mr. Reid’s and Mr. Steel’s testimony relating to the experience of health care foundations in other states and to the mission, structure, and governance of the proposed Alaska foundation. I find that this testimony is not strictly legal argument or legal opinion and that it may be helpful in developing the issues related to the Alaska foundation. Much of it responds to testimony offered by division consultants who will be testifying as witnesses at the hearing.

THEREFORE, IT IS HEREBY ORDERED:

1. Of the Reid prefiled direct testimony, the following testimony is stricken:
  - pp. 4 through 6, line 10;
  - p. 8, lines 8 through 12;
  - p. 21, line 8 through p. 22, line 3;
  - p. 26, lines 18 through 23.
2. The Reid prefiled rebuttal testimony is allowed in its entirety.
3. Of the Steel prefiled direct testimony, the following testimony is stricken:
  - p. 3, line 11 through p. 19, line 21;
  - p. 22, line 17 through p. 25, line 11.
4. Of the Steel prefiled rebuttal testimony, the following testimony is stricken:
  - p. 1, line 20 through p.4, line 2.

Dated: June 2, 2004



---

Linda S. Hall  
Director